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No. 00-67

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IN THE

Supreme Court of the United States

NORMAN MICHAELS,

Petitioner,

v.

AVITECH, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Avitech, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioner mischaracterizes the facts, legal issues and the basis of the court of appeals decision in its petition. Petitioner petitions this Court for clarity in the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but *Daubert* was not a basis for the decision of the court of appeals. Instead, the Fifth Circuit affirmed summary judgment applying the established summary judgment rules that have been repeatedly articulated by this Court. Instead of striking Petitioner's expert reports based on *Daubert* principles, the court of appeals found that, even giving full consideration of Petitioner's expert reports and affidavits, no disputed material issue of disputed fact was raised and Avitech was entitled to judgment as a matter of law. Petitioner's petition raises no issue that would justify this Court's review — there is no split among the courts of appeals as to any relevant legal issue, the Fifth Circuit panel was unanimous and the court of appeals simply followed well established law. Petitioner's petition for certiorari should be denied.

STATEMENT OF THE CASE

This is a negligence case arising from the fatal crash of a private single-engine Cessna aircraft in a thunderstorm on March 1, 1994, near Bay Minette, Alabama.[1] The decedents' estates brought two lawsuits against seven defendants in Pennsylvania. These first suits, against four manufacturers, were filed in Pennsylvania state court in April 1995. Two

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1. The negligence of the private pilot, a medical doctor, was so obvious that the pilot's negligence insurance policy paid a seven-figure policy limits settlement to the passengers' estates.

and one-half years later, those cases settled for millions of dollars. The day before the statute of limitations ran, decedents' estates filed more lawsuits in the United States District Court for the Eastern District of Pennsylvania against two more manufacturers and Avitech, a small Texas maintenance facility that did routine maintenance on the airplane more than three years before the crash. Petitioner mistakenly thought and alleged that Avitech had replaced the left vacuum pump on the aircraft, which failed in flight. Petitioner later discovered — after the statute of limitations had run — that Avitech had replaced only the right vacuum pump, more than three years before the crash. After extensive discovery, the suit against Avitech was severed and transferred to the Southern District of Texas.

The parties filed an agreed Joint Discovery/Case Management Plan in the district court after the transfer. Petitioner's ensuing discovery to Avitech focused on the replacement of the *left* vacuum pump. Only then did Petitioner discover that Avitech had only replaced the *right* vacuum pump. However, because Petitioner now had a limitations problem, instead of dismissing the suit against Avitech and adding the company that replaced the left vacuum pump as a defendant, Petitioner amended his pleadings to allege that Avitech's replacement of the *right* vacuum pump caused the failure of the *left* pump more than three years later.

In the Rule 26 discovery plan, Petitioner agreed to designate his experts by January 15, 1997. However, by the time of the first pretrial conference on June 12, 1997, Petitioner had still not designated any experts or taken any depositions. At that conference, counsel for Petitioner admitted to the district court that Avitech had been added as

a party to the litigation only because Petitioner anticipated that the manufacturers might try to place the blame for any pump failures on the shop that replaced the pump. At this conference, counsel for Petitioner alleged that his expert had found "debris" from "a" vacuum pump in the pneumatic system of the aircraft wreckage.

Skeptical that Petitioner could prove which of *four* alleged pump failures over a period more than three years could have been the source of the "debris," the court ordered Petitioner to designate its expert, with a report implicating Avitech. After receiving Petitioner's designation and "report," the district court stayed discovery pending a ruling on Avitech's motion for summary judgment. Avitech also filed a motion to strike Petitioner's experts, and the court heard oral argument.

The district court struck Petitioner's experts and granted Avitech's motion for summary judgment. (App. 21-36). In striking Petitioner's experts and reports, the district court agreed with Avitech, finding the Petitioner's expert reports to be "brief, conclusory" (App. 22), "superficial" (App. 25), "inadequate" (App. 29), in violation of Fifth Circuit law (App. 24), FED. R. CIV. P. 26 and the order of the court (App. 25). The court further found that "the Petitioner's failure to comply was an intentional attempt to gain a tactical advantage." (App. 28).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. In one section of Avitech's appellee brief, Avitech pointed out that, under the *Daubert* line of cases, the district court had a gatekeeping obligation to exclude conclusory, unreliable expert testimony. However, the Fifth Circuit did *not* do a *Daubert* analysis of the reports,

or rely on *Daubert* in its review. Instead, after determining that the expert reports were improperly excluded (on grounds other than *Daubert*), the court of appeals held that even considering the reports, the summary judgment evidence submitted by Petitioner did not raise a disputed issue of material fact:

> Although we find that the plaintiff's experts were improperly struck, we also find that no genuine questions of material fact exist, even considering all of the plaintiff's experts and reports. Thus we AFFIRM summary judgment in favor of the defendant.

(App. 2).

The court of appeals based its decision to affirm summary judgment on FED. R. CIV. P. 56(e) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986). (App. 11, 14). *Daubert* was not the basis for affirming summary judgment, and the court expressly stated that it was *not* doing a "Daubert inquiry." (App. 16). The court's references to *Daubert* merely pointed out that Petitioner's experts' testimony would be unlikely to survive a *Daubert* analysis.

ARGUMENT

I. THE REVIEWING COURT DID *NOT* MAKE A *DAUBERT* DETERMINATION.

Petitioner's entire petition rests on the assumption that the court of appeals conducted a *Daubert* review of his experts' proffered testimony. Petitioner repeatedly states that "the Fifth Circuit proceeded to conduct its own *Daubert*

analysis" (App. 6), engaged "in its own independent Daubert analysis" (App. 7), and "engaged in a *Daubert* determination of its own." (App. 9). Petitioner erroneously concludes that "[t]he court of appeals upheld summary judgment because the expert evidence 'would *likely* have been inadmissible' and '*may* not have survived a *Daubert* hearing.' " (Pet. 11-12).

It is quite easy to prove that the Fifth Circuit did not do a *Daubert* screening. As Petitioner points out, the court was very skeptical of the chances of his experts passing muster under *Daubert.* Yet, as noted above, the court of appeals clearly states: "Although we find that the plaintiff's experts were improperly struck, we also find that no genuine questions of material fact exist, *even considering all of the plaintiff's experts and reports.*" (App. 2).

Had the Fifth Circuit done a *Daubert* review, and struck the experts and reports, they could not have been considered in the decision regarding summary judgment.

The fallacy of this argument is obvious. Why would the court of appeals speculate about how Petitioner's experts would fare in a *Daubert* analysis if they were *doing* one?

Indeed, the court went to great lengths to make it clear that they were *not* doing a *Daubert* analysis. Moreover, far from creating a circuit split by disagreeing with *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184 (1st Cir. 1997), the Fifth Circuit favorably cites the case in dicta stating that "it is perhaps remiss to attempt a *Daubert* inquiry at the appellate level when the district court did not perform one." (App. 16). In a footnote, the Fifth Circuit further stated that "we in no way suggest that the *Daubert*

gatekeeping function may be transferred from the district court to the court of appeals." (App. 16).

This is hardly indicative of "*sua sponte* appellate determinations under *Daubert* hav[ing] due process implications." (Pet. 8). The court was deliberately circumspect as regards *Daubert*, agreeing only that the district court has a gatekeeping obligation.

After concluding that it would perhaps be "remiss to attempt a *Daubert* inquiry," the court appropriately concluded that "in determining whether the plaintiff has sufficient and competent summary judgment evidence for a given issue, it would be equally remiss for us to ignore the fact that a plaintiff's expert evidence lacks any rational probative value." (App. 16).

Petitioner further erroneously argues that "[t]he factual foundation of the expert evidence was not before the district court." (Pet. 7). Respondent argued before the district court that Petitioner's expert evidence was inadequate and lacked probative value. The district court had before it a plethora of discovery, expert reports, affidavits, photographs, schematic drawings, maintenance manuals, maintenance records, pilot records, Federal Aviation Administration records, Federal Aviation Regulations, and an entire factual report on the crash issued by the National Transportation Safety Board. Petitioner fails to identify any aspect of the "factual foundation of the expert evidence" that was "not before the district court."

In his statement of the case to this court, Petitioner says that the Fifth Circuit "considered issues neither briefed nor decided in the court below." (Pet. 6). This is simply not true, and Petitioner fails to identify any such issues.

Petitioner also says the court "articulated new rules for the consideration of expert evidence on summary judgment." (Pet. 6). Again, this is not true, and again, Petitioner quotes no such language from the opinion to support this interpretation.

Petitioner further states that the court of appeals "went beyond determining whether issues of material fact existed on the record before it." (Pet. 6). This allegation is not supported by the opinion: "After reviewing the complete summary judgment record, we find that no genuine issue of material fact exists which would preclude summary judgment for the defendant. *See* FED. RULE CIV. PROC. 56(e)." (App. 11).

II. EVEN IF THE REASONING OR BASIS OF THE DISTRICT COURT'S DECISION IS WRONG, IF THE HOLDING IS CORRECT, IT MUST BE AFFIRMED AS A MATTER OF LAW.

The Fifth Circuit found that even though it was an abuse of discretion to strike Petitioner's experts, the district court's decision to grant summary judgment was correct. (App. 2). If a lower court arrives at the correct decision for the wrong reasons, the decision must be affirmed:

> It is well settled that a judgment, which is correct in ultimate effect, will not be disturbed on appeal even though the lower court relied upon a wrong ground or gave an untenable reason for its action. The issue on appeal is the correctness in ultimate effect of a judgment and not the reason or reasons given for it by the trial court. *If the judgment is sustainable upon any legal basis, it will be upheld*

> *on appeal despite the erroneous or untenable reasons given by that court for its entry.*

In re Public Serv. Co. of New Hampshire, 879 F.2d 987, 989 (1st Cir. 1989), cites omitted. *See also Brown v. Speller,* 344 U.S. 443, 459 (1953), citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (" 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' "); *accord, Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1224 (3rd Cir. 1995).

Thus, even if the trial court granted summary judgment because it struck Petitioner's experts, but the Fifth Circuit determined that, even *considering* the experts and their reports, no genuine issue of material fact exists (App. 2), the court of appeals was required, as a matter of law, to affirm the judgment. The Fifth Circuit recognized this obligation in its opinion. ("[S]ummary judgment can be affirmed on any legally sufficient ground, even one not relied on by the district court.") (App. 10), citing *BMG Music v. Martinez,* 74 F.3d 87, 89 (5th Cir. 1996); *accord, In the Matter of Larson C. Locklin,* 101 F.3d 435, 441 (5th Cir. 1996).

III. THE *CORTES-IRIZARRY* CASE IS DISTINGUISHABLE AND DOES NOT CONFLICT WITH THIS CASE.

Petitioner's reliance on *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184 (1st Cir. 1997) to create a split in the circuits is misplaced. In *Cortes-Irizarry*, the court recognized that "[t]he *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered

expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment." *Id.* at 188. However, the court of appeals declined to initiate a *Daubert* analysis in the case before it for three reasons: (1) the Defendant never requested the district court to strike the Petitioner's expert statements, (2) the district court did not exclude the testimony and did not cite *Daubert*, and (3) the record on appeal was "wholly inadequate to permit a reasoned *Daubert* determination." *Id.* at 189. In this regard, the only thing the opinions in *Cortes-Irizarry* and the present case have in common is that neither district court cited *Daubert*. In all other procedurally significant respects, as regards the *Daubert* issue, the cases are easily distinguishable. Specifically, in this case, (1) the Defendant *did* ask the district court to exclude the Petitioner's expert testimony, (2) the district court *did* exclude the testimony, and (3) the record on appeal was complete and extensive.

The court in *Cortes-Irizarry* was concerned about the "inadequacy" of the record before it, stating that it could "envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the *nisi prius* [trial] court has had a meaningful opportunity to mull the question." *Id.* at 189. This is simply stating the obvious. Petitioner does not cite any cases where an appellate court has made such an attempt.[2]

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2. As will be discussed later, however, the Third Circuit recently held that "cold record" assessments are "often" acceptable. *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994).

Unlike *Cortes-Irizarry,* the record in this case was neither "cold" nor "poorly developed." The Fifth Circuit performed its *de novo* review on "the complete summary judgment record." (App. 11). The court considered "all of the Petitioner's experts and reports." (App. 2). This is hardly a "cold, poorly developed record."

IV. UNDER THE PROPER CIRCUMSTANCES, FEDERAL APPELLATE COURTS CAN AND DO INITIATE DAUBERT EVALUATIONS OF EVIDENTIARY ISSUES WHEN THERE HAS BEEN NO EXPRESS DAUBERT RULING IN THE COURT BELOW.

While it is obvious that the Fifth Circuit did not do a *Daubert* analysis in the present case, Petitioner has alleged not only that it was done, but that it was improper and represents a split in the circuits. Avitech will briefly address this.

Petitioner argues that if the Fifth Circuit were allowed to use the *Daubert* guidelines to review lower court decisions, when the lower courts have granted summary judgment but have not made explicit *Daubert* rulings, it would somehow put that circuit at odds with the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. Yet, each of these circuits has explicitly applied *Daubert* for the first time on appeal.

In *Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995), *Daubert* was raised, for the first time, at oral argument on appeal. In affirming summary judgment, the First Circuit found that the district judge had "properly relied" on the *Daubert* "precept." *Id.* at 39.

In the case of *In re Paoli R. R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 513 U.S. 1190 (1995), the Third Circuit had an extremely complex case which relied almost entirely on expert opinions. Between the time of the district court's grant of summary judgment and the appeal, this Court issued the *Daubert* decision. Rather than remand to the trial court for a *Daubert* review, the Third Circuit performed its own exhaustive *Daubert* analysis. *In re Paoli*, 35 F.3d at 732. In so doing, the Third Circuit observed that "evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses and thus is often not significantly more difficult on a cold record." *Id.* at 749. The resulting opinion was 82 pages long, and focused primarily on *Daubert* issues.

While not a summary judgment case, Petitioner cites *Greenwell v. Boatwright*, 184 F.3d 492 (6th Cir. 1999) for the notion that the Sixth Circuit "affirmed" a district court's "refusal" to hold a *Daubert* hearing before excluding expert testimony. (Pet. 17). In fact, the court of appeals simply acknowledged that the district court was not "required" to "hold an actual hearing to comply with *Daubert*." What Petitioner failed to tell the Court about this decision, however, is far more relevant to this case. The Sixth Circuit went on to find:

> Because the district court did not hold a Daubert hearing we must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony. . . . We find that this testimony satisfies the two-prong test of Daubert and was properly admitted by the district court.

Id. at 498.

In *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139 (7th Cir. 1998), the Seventh Circuit affirmed summary judgment in which expert testimony was excluded, but the record was unclear as to the reason for the exclusion. The Defendant argued on appeal that "what the court really did, albeit without saying so explicitly, was to exclude the [expert] report as unreliable under the standard announced in *Daubert.*" *Id.* at 1142, cite omitted. The court acknowledged that "[t]his Court first must resolve, therefore, whether the district court's Order excluded the [expert] report as unreliable under *Daubert.*" *Id.* The Seventh Circuit proceeded with a *Daubert* analysis, and found no abuse of discretion. *Id.* at 1145.

In *Bednar v. Bassett Furniture Manuf. Co., Inc.*, 147 F.3d 737, 740 (8th Cir. 1998), the Eighth Circuit reversed summary judgment, citing *Daubert* as a basis for finding expert testimony acceptable. There is no mention in the record of *Daubert* being considered by the trial court.

Contrary to Petitioner's representation that "[t]he Ninth Circuit requires serial affidavits from experts in the context of summary judgment motions," (Pet. 15), no such requirement exists in that circuit. Petitioner cites *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) as authority for this "requirement." It is true that the district court in *Claar* was dissatisfied with the first set of expert affidavits it received from the Petitioners, and gave them a second chance, but there is no suggestion that this is a Ninth Circuit "requirement," or even that it was done in any other cases. *Id.* at 500.

More significant is the fact that the trial court in *Claar* granted summary judgment after the second set of affidavits failed to meet the requirements of FED. R. EVID. 702.

Id. at 501-503. The record does not contain any references to a *Daubert* analysis being performed by the trial court. Nevertheless, the Ninth Circuit did a *Daubert* analysis of the proffered expert testimony and found no error in the district court's exclusion. *Claar* at 501-503.

It is relevant to note that the Ninth Circuit is the source of the original *Daubert* appellate decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991). This Court vacated and remanded that decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the landmark decision that is the seminal case for the entire controversy now before the Court. Interestingly, on remand from this Court, the Ninth Circuit very deliberately did not further remand the case to the district court. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1314-1315 (9th Cir. 1995), *cert. denied, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 516 U.S. 869 (1995). Instead, it performed an *exhaustive* review of the record below using the new *Daubert* criteria. *Id.* at 1315-1322.

The Tenth Circuit in *United States v. Davis*, 40 F.3d 1069 (10th Cir. 1994), *cert. denied, Davis v. United States*, 514 U.S. 1088 (1995), addressed a situation where the Defendants did not cite *Daubert* at trial, but raised *Daubert* issues on appeal. *Id.* at 1073. The court of appeals did an analysis of the relevant *Daubert* issues and affirmed. *Id.* at 1075.

V. THE COURT AND THE FEDERAL RULES HAVE ALREADY PROVIDED MORE THAN ADEQUATE GUIDANCE REGARDING "PROCEDURAL PROTECTIONS" NECESSARY FOR *DAUBERT* CHALLENGES IN THE SUMMARY JUDGMENT CONTEXT.

Over the last seven years, this Court has provided extensive guidelines to assist courts in gaining control over unreliable expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137. Petitioner now asks this Court to revisit these decisions and liberalize the rules to protect parties that provide incomplete, inadequate and sloppy expert testimony. This Court should decline.

The rules themselves are not hard to understand. When a party expects to use an expert witness pursuant to Federal Rule of Evidence 702, the expert must produce a signed, written report containing "a *complete* statement of *all* opinions to be expressed and the *basis* and *reasons* therefore," including "the data or other information considered by the witness in forming the opinions." FED. R. CIV. P. 26(a)(2)(b), emphasis added. These reports must be "detailed" and not "sketchy" or "vague." FED. R. CIV. P. 26, Advisory Committee's Notes, Paragraph 16. "*Preliminary* questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence. . . ." FED. R. EVID. 104(a), emphasis added.

If a party seeks summary judgment, it "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Any affidavits in opposition to summary judgment "shall set forth such facts *as would be admissible in evidence* . . . showing that there is a *genuine* issue for trial." FED. R. CIV. P. 56(e), emphasis added.

Daubert held that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 590. *Kumho* held that this same "gatekeeping" obligation applies to *all* expert testimony, not just that which would be considered "scientific." *Kumho*, 526 U.S. at 147.

> Faced with a proffer of expert . . . testimony, then, the trial judge must determine *at the outset*, pursuant to Rule 104(a), whether the expert is proposing to testify to . . . knowledge that . . . will assist the trier of fact to understand or determine a fact issue. This entails a *preliminary* assessment of whether the reasoning or methodology properly can be applied to the facts in issue.

Daubert at 592-593, footnotes and some text deleted, emphasis added. "These matters should be established by a preponderance of proof." *Daubert* at 593, citing *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987). *Joiner* clearly established that the standard of review of a district judge's admissibility rulings is "abuse of discretion." *Joiner* at 146.

"[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient

to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment, FED. R. CIV. P. 56." *Daubert* at 596.

In the instant case, Petitioner says these rules and guidelines are not enough, and the Court's guidance is "required" to "delineate" procedural protection. (Pet. 12). He complains that "[t]he Court's decisions have not spoken to the parameters of *Daubert* at the summary judgment stage." (Pet. 13). Yet, he admits that *Daubert, Joiner* and *Kumho* all arose in the summary judgment context.

Of even more importance is the fact that the sole purpose of this Court's *Joiner* opinion was to address this very issue. "We granted certiorari in this case to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*." In *Joiner*, the trial court excluded the plaintiff's expert testimony because it "did not rise above 'subjective belief or unsupported speculation.' " *Id.* at 140. The court of appeals applied an "overly 'stringent' review" to the district court's ruling because it was dispositive to the plaintiff's case. *Id.* at 141, 143. A unanimous Supreme Court found this standard of review to be in error because "it failed to give the trial court the deference that is the hallmark of abuse of discretion review." *Id.* at 143.

Contrary to Petitioner's lament, in the unanimous portion of the *Joiner* decision, the Court "spoke" to the parameters of *Daubert* in the summary judgment context:

> A court of appeals applying "abuse of discretion" review . . . may not categorically distinguish between rulings allowing expert testimony and

> rulings which disallow it. . . . We likewise reject defendant's argument that because the granting of summary judgment in this case was "outcome determinative," it should have been subjected to a more searching standard of review . . . the question of admissibility of expert testimony is . . . reviewable under the abuse of discretion standard.

Joiner, 522 U.S. at 142-143, cites and some text omitted.

Joiner already "answered" Petitioner's "question whether *Daubert* analysis should apply in the same measure on summary judgment as at trial," which Petitioner found to be a "particularly troublesome" question. (Pet. 13).

Petitioner seems to actually suggest abandoning the entire summary judgment procedure when *Daubert* issues are involved. In support, he cites *Cortes-Irizarry*, 111 F.3d at 188, and a couple of law review articles suggesting the district court's "gatekeeper" function should be handled at trial. (Pet. 13-15). Of course, this flies in the face of what this Court has established as a fundamental precept of federal jurisprudence. In the landmark case of *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986), this Court observed that "[o]ne of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."

If a suggestion that cases having *Daubert* issues should somehow be "immune" from summary judgment can even be taken seriously, it raises a specter of unmanageable federal

dockets. It would virtually guarantee that every Petitioner in federal court would find a *Daubert* issue in his or her case.

In a nod to reality, Petitioner suggests *limine* hearings to resolve a perceived "dichotomy" arising when *Daubert* issues are raised in a summary judgment context. (Pet. 14-15). On the surface, this appears to be a reasonable, prudent policy. However, Petitioner seems to be asking this Court to make such a procedure mandatory, and this is where the proposal runs afoul of well-established precedent painstakingly developed by this Court through the *Daubert* line of cases.

This issue was directly addressed by this Court in *Kumho*: "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Kumho* at 152. This Court has consistently and deliberately refrained from dictating a "one-size fits all" approach, consciously preferring to "give the trial court the deference that is the hallmark of abuse of discretion review." *Joiner* at 143.

The *Daubert* Court emphasized a "flexible inquiry," preferring to give the trial courts guidelines rather than procedural mandates. *Daubert* at 579, 593-595. "We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593.

Petitioner uses two Third Circuit cases to support his argument that this Court consider requiring trial courts to

hold *limine* hearings on *Daubert* issues. However, both of these opinions freely acknowledge that such hearings are not always needed. In *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3rd Cir. 1999), the court found that "[a]n *in limine* hearing will obviously not be required whenever a *Daubert* objection is raised to a proffer of expert evidence. Whether to hold one rests in the sound discretion of the district court."

Petitioner also cites *In re TMI Litigation,* 199 F.3d 158, 159 (3rd Cir. 2000) as having held a five week long *in limine* hearing. (Pet. 14). *TMI* was an extraordinarily complex case. It involved thousands of plaintiffs and an accident releasing radioactive materials into the environment from a nuclear power plant. *In re TMI Litigation,* 193 F.3d 613, 623 (3rd Cir. 1999). Obviously, extensive *in limine* hearings were required to consider the *Daubert* issues in this case. However, *In re TMI Litigation,* 199 F.3d 158 (3rd Cir. 2000) was a modification to the previously issued *TMI* opinion, and in it the court made clear that it "did not intend to suggest that an *in limine* hearing is always required for *Daubert* gatekeeping." *Id.* at 159.

A very recent case with an extensive analysis of this issue is *United States v. Alatorre,* 2000 WL 1154280 (9th Cir. (Cal)). The *Alatorre* opinion rejects the idea of mandatory *Daubert* hearings, and supports the flexibility that the courts, especially this Court, have given the trial courts in deciding when and how to make *Daubert* determinations. *See also Kirstein v. Parks Corp.,* 159 F.3d 1065, 1067 (7th Cir. 1998) ("We have not required that the *Daubert* inquiry take any specific form and have, in fact, upheld a judge's *sua sponte* consideration of the admissibility of expert testimony.").

In further support of his urging of mandatory *Daubert* hearings, Petitioner complains of a "complete absence of procedural protection" in the present case. (Pet. 15). This is simply not true. Discovery was exchanged by both parties. Petitioner claimed to have experts, with opinions, "long before" suing Avitech (Pet. App. 24-25), but he ignored the Rule 26 Joint Discovery/Case Management Plan and did not designate any experts until forced to do so by the trial court. It was Petitioner's responsibility, and no one else's, to get before the court the evidence necessary to survive a motion for summary judgment. "[A] litigants' failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigants' own risk." *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 897 (1990). Discovery was not stayed until a year and a half after suit was filed. The court held two pre-trial conferences. Petitioner designated a total of seven experts, all of whom filed reports, with several filing one or more supplemental reports after the stay of discovery. "Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.,* 120 S. Ct. 1011, 1021 (2000). Petitioner filed briefs to the district court in opposition to Avitech's motion for summary judgment and motion to strike his experts. His brief in opposition to summary judgment was supplemented twice. Finally, the court held a hearing more than 21 months after Petitioner filed suit.

Petitioner claims that all of this constituted a "complete absence of procedural protection," yet in the same breath points out that the court of appeals found that it was abuse of discretion to strike his experts. (Pet. 15). His experts were struck because of the wording in the discovery order. (App. 10). This sounds a great deal like "procedural protection."

VI. THERE IS NO NEED FOR THE COURT TO "ELABORATE ON THE KINDS OF CIRCUMSTANCES THAT TRIGGER JUDICIAL SCREENING PURSUANT TO FED. R. EVID. 104(a)."

Petitioner asserts that this Court has "expanded" the "flexible reach of *Daubert*," (Pet. 15), but he fails to identify any such "expansion" other than the one he alleges by the Fifth Circuit in the present case. (Pet. 15-16). Nor does he clearly explain what he is looking for in his request that this Court "elaborate on the kinds of circumstances that trigger judicial screening pursuant to Federal Rules of Evidence 104(a)." The simple answer to the implied question, "when should a party invoke a court's gatekeeping authority" is: whenever the reasoning, methodology or applicability of proffered expert testimony is in question. *Daubert* at 592-593.

Petitioner is concerned that trial courts in general, and the trial court below in particular, improperly make admissibility decisions on the basis of conclusions rather than reasoning, methodology or applicability. This Court has already clearly warned trial courts not to do this. *Daubert* at 595.

The real problem, as this Court has already pointed out, is that "conclusions and methodology are not entirely distinct from one another." *Joiner* at 519. The problem was, in fact, identified eloquently in *Daubert*:

> We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, *inevitably* on occasion will prevent the jury from learning of authentic insights and innovations. That,

> nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Daubert at 597, emphasis added.

When dealing with matters such as expert *opinions*, there are limits to what courts can decree as a matter of law. Expert testimony is simply too fact-intensive to "force fit" it into an inflexible mold. The only thing that would make a trial judge's task more difficult in a *Daubert* or Rule 104(a) ruling would be for this Court to dictate exactly how it had to be done. Indeed, as this Court pointed out less than two years ago:

> The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. . . . The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Kumho at 150, citing in part Brief for United States as Amicus Curiae 19.

Petitioner purports to "expose" a split among the circuits on the issue of *Daubert* challenges. He fails. He states that the "Sixth and Tenth Circuits hold that a *Daubert* hearing is not appropriate when an evidentiary challenge is made to the adequacy of any expert's conclusions, rather than the theory or methodology underlying those conclusions." (Pet. 17). This is perfectly consistent with *Daubert*. "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert* at 595. Petitioner cites *Greenwell v. Boatwright,* 184 F.3d 492, 497 (6th Cir. 1999) in support of his exposé. (Pet. 17). In *Greenwell*, "the factual underpinnings of the expert's testimony were sound," and the plaintiffs did not offer any basis for questioning its scientific validity or relevancy. *Id.* at 498. The Sixth Circuit found no error in admitting the testimony. *Greenwell* was decided in accordance with established *Daubert* principles.

Petitioner states that in *United States v. Nichols,* 169 F.3d 1255, 1263 (10th Cir. 1999), the Daubert challenge was to technique rather than the expert's theory or methodology, and therefore the holding was that the trial court did not abuse its discretion in refusing to hold a Rule 104(a) hearing. (Pet. 17-18). Again, this holding is perfectly consistent with the *Daubert* trilogy, and it is difficult to understand how these two cases are representative of any sort of variant *Daubert* procedures.

Petitioner attempts to contrast the holding in *Greenwell* and *Nichols* with two cases from the Seventh and Eighth Circuits (Pet. 18), saying that the latter are prone to endorse *Daubert* hearings upon challenges to "lack of factual foundation supporting the expert's opinion." (Pet. 18). Again, this does not reveal a problem, and is certainly consistent with the guiding principles of the *Daubert* trilogy.

In *Clark v. Takata Corp.*, 192 F.3d 750, 759-760 (7th Cir. 1999), the trial court found that the plaintiff's expert "failed to identify, much less offer, any evidence to support his conclusion," resulting in the district judge being "unable to determine what methodology or reasoning, if any, serves as the basis for [the expert's] opinions." *Id.* at 758. The judge struck the expert's testimony and granted summary judgment. *Id.* at 755. This was a textbook case for proper procedure when *Daubert* and a motion for summary judgment intersect.

In the other case, *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999), Petitioner incorrectly states that there was a *Daubert* hearing at which "the Petitioner failed to make a countervailing factual showing supporting summary testimony of experts." (Pet. 18). He has not accurately described the trial court proceedings. First, there was no *Daubert* hearing. Second, the failure to make a "countervailing factual showing" related only to the summary judgment phase of the proceeding, after the experts testimony had already been struck. *Id.* at 1085. Thus, the "factual showing" issue in the case had nothing to do with *Daubert*.

The Eighth Circuit "closely reviewed" the district court's record and found the experts' testimony "unabashed speculation," "unreliable," and "extremely questionable" before finding that the lower court had not abused its discretion in excluding the testimony under *Daubert* and granting summary judgment. *Id.* at 1084-1085. Again, the case is a perfect example of how *Daubert* is properly used in the summary judgment context.

CONCLUSION

Petitioner has attempted to create an issue where none exists. The Fifth Circuit did not do a *Daubert* review of the trial court proceedings. It not only expressly stated such (App. 16), it considered *all* of the Petitioner's proffered experts and reports in its decision to grant summary judgment pursuant to Federal Rule of Civil Procedure 56(e) and *Anderson v. Liberty Lobby*. (App. 11, 14). It obviously could not have considered these proffers if it had found them inadmissible in a *Daubert* analysis.

Petitioner attempts to convince this Court that it has somehow been remiss in failing to provide adequate "guidance" to the lower courts on how to handle *Daubert* issues which arise in conjunction with motions for summary judgment. The facts demonstrate otherwise. This Court has devoted three landmark decisions, two in the last three years, to this issue. All of these cases arose in the "context" of motions for summary judgment. During the last seven years, almost three *thousand* reported decisions have cited *Daubert, Joiner* or *Kumho.* Petitioner has not cited a single post-*Kumho* decision where a lower court expressed a need for further guidance on this issue from this Court.

There is certainly no need for this Court to "elaborate on the kinds of circumstances that trigger judicial screening pursuant to Federal Rule of Evidence 104(a)." The Court has already made it clear that, as regards Rule 104(a) in the context of application of *Daubert* factors, the courts are to focus on methodology, reliability, and applicability. If courts want to evaluate the conclusions drawn from these factors, they are "free" to use Federal Rule of Civil Procedure 56 and the *Celotex/ Anderson* line of cases.

There is no discernable "split" among the federal circuits in the application of *Daubert* to the summary judgment process. The guiding principals in this matter are some of the most well-developed in our jurisprudence. It is not broken, and therefore does not need to be fixed.

For these reasons, the petition should be denied.

Respectfully submitted,

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